

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RAY ANN HOWARD,  
O/B/O A.B., a minor child,

Plaintiff,

Civil Action No. 12-11652

v.

HON. THOMAS L. LUDINGTON  
U.S. District Judge  
HON. R. STEVEN WHALEN  
U.S. Magistrate Judge

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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**REPORT AND RECOMMENDATION**

Plaintiff Ray Ann Howard brings this action on behalf of her minor grandson under 42 U.S.C. §405(g), challenging a final decision of Defendant Commissioner denying her application for Childhood Supplemental Security Income under the Social Security Act. Both parties have filed summary judgment motions which have been referred for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, I recommend that Defendant's Motion for Summary Judgment [Doc. #19] be GRANTED, and that Plaintiff's Motion for Summary Judgment [Doc. #14] be DENIED.

**PROCEDURAL HISTORY**

Plaintiff, proceeding on behalf of her minor grandson ("Claimant"), applied for Childhood Supplemental Security Income on August 5, 2008, alleging disability as of

January 1, 2006 (Tr. 90, 94-95). On May 24, 2010, Administrative Law Judge (“ALJ”) Andrew G. Sloss presided at an administrative hearing held in Flint, Michigan (Tr. 26). Plaintiff, Claimant, and Claimant’s mother testified (Tr. 35-57). On February 15, 2010, ALJ Sloss found Claimant not disabled (Tr. 22). On March 6, 2012, the Appeals Council denied review (Tr. 1-4). Plaintiff filed for judicial review of the final decision on April 10, 2012.

### **BACKGROUND FACTS**

Claimant, born January 13, 2005, was five when ALJ Sloss issued his decision (Tr. 22, 90). Plaintiff originally alleged disability on the basis of speech and behavior problems and “possible autism” (Tr. 138).

#### **A. The Hearing Testimony**

Plaintiff, Claimant’s mother, and Claimant offered the following testimony:<sup>1</sup>

According to Plaintiff and Claimant’s mother, Claimant was disabled as a result of Attention Deficit Hyperactivity Disorder (“ADHD”), asthma, and speech and language delay (Tr. 35). He experienced asthma since birth and was currently receiving treatment for the condition (Tr. 36). He currently took Albuterol for asthma and Methylin for ADHD (Tr. 39). He was enrolled in a Head Start program in Saginaw, Michigan (Tr. 39). He had three siblings, ages, thirteen, nine, and two (Tr. 40). He liked to play and fight with his oldest sibling (Tr. 40). Claimant could identify colors (Tr. 41). He was able to understand but did not always follow directions by his mother and grandmother (Tr. 42).

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<sup>1</sup>Testimony was offered by Plaintiff and Claimant’s mother in no particular order. I have denoted where Claimant (rather than his mother and grandmother) was speaking.

Claimant stated that he played “Toy Story,” “Buzz Light Year,” and enjoyed playing with dinosaurs and orange and yellow trucks (Tr. 43). He stated that he had a friend at school named Arianna (Tr. 45). Claimant reported that he did not experience trouble playing with blocks or throwing a ball and liked puzzles (Tr. 45-46). He stated that he rode a bicycle with training wheels and could dress himself (Tr. 46-47).

Claimant’s mother and Plaintiff agreed that Claimant was impulsive and was inclined to run into the street if someone failed to hold his hand while taking a walk (Tr. 48). Humid and warm weather exacerbated Claimant’s asthma, which on occasion required emergency treatment (Tr. 49). He last had an asthma attack four months before the hearing (Tr. 49-50). Claimant was described as “very, very active” with a short attention span (Tr. 50-51). His behavioral problems required Plaintiff to pick Claimant up at school on occasions (Tr. 53). On occasions, he was intermittently hyperactive and sleepy (Tr. 54). The medicine prescribed for ADHD was currently losing its effectiveness (Tr. 55).

## **B. Medical and Academic Evidence**

January, 2005 hospital records created two days after Claimant’s birth show he was prescribed Albuterol two days after his birth (Tr. 202). April, 2005 records show that Claimant continued to take Albuterol (Tr. 193). December, 2005 treating records show that a prescription for Benadryl was renewed (Tr. 196). In October, 2007, Plaintiff noted that Claimant “very frequently” had tantrums and became frustrated easily (Tr. 209). The evaluating teacher found that Claimant experienced the same conditions “frequently” (Tr.

211). Initiative and self control were identified as areas of concern (Tr. 212). A July, 2008 assessment found the presence of a possible speech/language impairment (Tr. 213). The same month, Claimant, formerly a ward of Saginaw County Department of Human Services,” was placed in Plaintiff’s home (Tr. 228). Claimant passed a physical screening for admittance to a Head Start program (Tr. 214).

An October, 2008 teacher’s assessment states that Claimant did not exhibit behavior giving rise to concerns on a “very frequent” basis, but that he expressed frustration and became emotional “frequently” (Tr. 211). The same month, Head Start notes state that Claimant experienced asthma (Tr. 287). Kathryn Kraijkowski found that Claimant “would benefit from mental health interventions for the classroom and home environment” (Tr. 220). Westlund Guidance Clinic findings state that Claimant experienced “significant” interference from psychological symptoms (Tr. 294). His appearance and mood were deemed appropriate but he exhibited defiance and hyperactivity (Tr. 294-295). His interactions with other children was deemed appropriate (Tr. 296). Claimant displayed impulsivity but was cooperative with no signs of aggression (Tr. 296).

November, 2008 case development notes state that Claimant was referred for mental health treatment and speech therapy but did not pursue treatment (Tr. 238). In December, 2008, Janet Topham, a diagnostic teacher, Dr. Pamela Elber, school psychologist, and Kathleen Kinnish, a speech pathologist performed a consultative psychological evaluation (Tr. 241-248, 298-308). Plaintiff reported that Claimant was unusually active and experienced difficulty focusing (Tr. 241). Claimant exhibited good gross motor skills (Tr.

243). His fine motor skills were found to be “slightly” below average (Tr. 243). Claimant was impulsive with a short attention span but improved focus during story time (Tr. 244). His academic skills were in the low average range (Tr. 245). He demonstrated a “severe” phonological disorder (Tr. 246). His “general knowledge and comprehension skills” were deemed “somewhat delayed” (Tr. 248). He met the criteria for special education services as a result of a speech and language impairment (Tr. 259).

The same month, Ron Marshall, Ph.D. completed a non-examining assessment of the academic and treating records. Dr. Marshall found less than marked limitations in acquiring and using information but declined to make additional findings (Tr. 232-233). He noted a January, 2008 exacerbation of asthma (Tr. 233). He found insufficient evidence for a finding of disability (Tr. 230). December, 2008 case development notes restate that Claimant had not received mental health or speech therapy treatment (Tr. 221-223, 239).

In March, 2009, Ms. Kinnish found that Claimant experienced an “articulation impairment” (Tr. 318). Accompanying notes state that the impairment was “mild” (Tr. 320, 323, 325). Kelly M. Mason, MACCC-SLP stated that attendance problems impacted Claimant’s progress (Tr. 323, 328). His ability to articulate was ranked in the 11<sup>th</sup> percentile (Tr. 328). The same month, academic records showed that full scale, verbal, and performance IQs were in the average range (Tr. 250). However, his speech, was deemed “difficult to understand” and well below average for his age level (Tr. 250, 262).

April, 2009 Head Start records state that Claimant experienced “moderate persistent asthma” treated with Albuterol and Benadryl “only as needed” (Tr. 284). The same month,

his ADHD medication was changed after his mother noted that he was unfocused (Tr. 345). In September, 2009, Claimant passed a physical exam for continued participation in Head Start (Tr. 280-281). February, 2010 treating notes show that Claimant continued to take Ritalin (Tr. 335).

### **C. The ALJ's Decision**

Citing the medical records submitted as of the date of his decision, ALJ Sloss found that while Claimant experienced the severe impairments of “mild articulation disorder, ADHD and asthma,” the conditions did not meet or equal any listed impairments in 20 C.F.R. 404, Subpart P, Appendix 1 (Tr. 13-14). He found that in the domain of “Acquiring and Using Information,” Claimant had “less than marked limitation” (Tr. 17). In the domain of “Attending and Completing Tasks,” he also found “less than marked limitation” (Tr. 17). In the domain of “Interacting and Relating to Others,” the ALJ also found that Claimant had less than “marked” limitations (Tr. 19). The ALJ found no limitations in the domain of “Moving About and Manipulating Objects” or the domain of “Caring for Yourself;” and less than marked limitations in “Health and Physical Well-Being” (Tr. 19-21).

Citing the medical and academic records, the ALJ noted that Claimant last experienced an asthma attack four months before the hearing (Tr. 15). He observed that recent academic records showed that Claimant’s speech and language impairments were currently “mild” (Tr. 15). The ALJ also noted that Claimant was able to socialize with other children and was capable of using language to make his needs known (Tr. 19).

### **STANDARD OF REVIEW**

The district court reviews the final decision of the Commissioner to determine whether it is supported by substantial evidence. 42 U.S.C. §405(g); *Sherrill v. Secretary of Health and Human Services*, 757 F.2d 803, 804 (6<sup>th</sup> Cir. 1985). Substantial evidence is more than a scintilla but less than a preponderance. It is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, S. Ct. 206, 83 L.Ed.126 (1938)). The standard of review is deferential and “presupposes that there is a ‘zone of choice’ within which decision makers can go either way, without interference from the courts.” *Mullen v. Bowen*, 800 F.2d 535, 545 (6<sup>th</sup> Cir. 1986)(en banc). In determining whether the evidence is substantial, the court must “take into account whatever in the record fairly detracts from its weight.” *Wages v. Secretary of Health & Human Services*, 755 F.2d 495, 497 (6<sup>th</sup> Cir. 1985). The court must examine the administrative record as a whole, and may look to any evidence in the record, regardless of whether it has been cited by the ALJ. *Walker v. Secretary of Health and Human Services*, 884 F.2d 241, 245 (6<sup>th</sup> Cir. 1989).

### **FRAMEWORK FOR DISABILITY DETERMINATIONS**

#### **Childhood Benefits**

42 U.S.C. § 1382c (a)(3)(C)(I) provides that “[a]n individual under the age of 18 shall be considered disabled” if he or she “has a medically determinable physical or mental

impairment which results in marked and severe functional limitations.”<sup>2</sup> In evaluating whether a child is disabled, the Commissioner is to consider, in sequence, whether the child claimant 1) is “doing substantial gainful activity” 2) has a severe impairment, and if so 3) has “an impairment(s) that meets, medically equals, or functionally equals the listings.” 20 C.F.R. § 416.924(a). In determining whether the child claimant is disabled at the third step, the Commissioner determines functional ability in six domains:

- (i) Acquiring and using information;
- (ii) Attending and completing tasks;
- (iii) Interacting and relating with others;
- (iv) Moving about and manipulating objects;
- (v) Caring for yourself; and,
- (vi) Health and physical well-being.

20 C.F.R. § 416.926a(b)(1).

To establish disability at the third step, “the impairment(s) must . . . result in ‘marked’ limitations in two domains of functioning or an ‘extreme’ limitation in one domain.” *Id.* A “marked” limitation is defined as an impairment(s) that “interferes seriously” with the ability “to independently initiate, sustain, or complete activities.” 20 C.F.R. §

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<sup>2</sup>Childhood claims are subject to the same 12-month durational requirement as adult claims. 42 U.S.C. § 1382c (a)(3)(C)(i)



416.926a(e)(2). An “extreme” limitation “interferes *very* seriously” with the ability “to independently initiate, sustain, or complete activities”(emphasis added). 20 C.F.R. § 416.926a(e)(3).

### **ANALYSIS**

Addressing the third step of the sequential analysis, Plaintiff disputes the ALJ’s conclusions in five of the six domains of functioning. *Plaintiff’s Brief* at 4-12, *Docket #14* (citing Tr. 17-21). She does not contest the ALJ’s finding in the domain of “moving about and manipulating objects,” but argues that he erred by finding less than marked limitations in the remaining five categories. *Id.*

#### **A. Acquiring and Using Information**

Plaintiff argues first that Claimant has marked limitations in acquiring and using information. *Plaintiff’s Brief* at 4-6. She cites a September, 2008 academic finding that Claimant, then three, knew only his first name and was unable to identify more than two out of five colors. *Id.* at 5 (citing Tr. 215). Plaintiff also notes that in December, 2008, a psychological evaluation showed that Claimant had difficulty sitting still for a story, identifying all the letters of the alphabet, and pronouncing words correctly. *Id.* (citing Tr. 242).

In childhood disability claims, a marked limitation is defined as follows

(i) We will find that you have a marked limitation in a domain when your impairment(s) interferes seriously with your ability to independently initiate, sustain, or complete activities. Your day-to-day functioning may be seriously

limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limit several activities. Marked limitation also means a limitation that is more than moderate but less than extreme. 20 CFR § 416.926a(e)(2)(internal quotations omitted).

Section 416.926a(g)(3) contains a non-exhaustive list of signs of impairment in acquiring and using information:

(i) You do not demonstrate understanding of words about space, size, or time; e.g., in/under, big/little, morning/night. (ii) You cannot rhyme words or the sounds in words. (iii) You have difficulty recalling important things you learned in school yesterday. (iv) You have difficulty solving mathematics questions or computing arithmetic answers. (v) You talk only in short, simple sentences and have difficulty explaining what you mean.

However, the mere presence of these limitations does not imply that they are marked or extreme. § 416.926a(f)(3). Instead, determination of whether these impairments are marked or extreme depends upon the available evidence in each case. *Id.*

Substantial evidence supports the ALJ's conclusion that Claimant's limitations in this domain were less than marked. In support of his finding, the ALJ correctly noted that Claimant was able to identify colors and that a speech impairment did not prevent him from using "verbal language to make his wants and needs known" (Tr. 17, 43). A December, 2008 evaluation, cited by Plaintiff, also shows that Claimant's cognitive abilities were average and that his focus was improved during story time (Tr. 244-245). While Claimant exhibited "somewhat delayed" development in speech and comprehension, he also scored above age level in two sub-categories and was age appropriate in three others (Tr. 247-248). Notwithstanding March, 2009 academic records showing that Claimant's speech was

“difficult to understand” and well below average for his age level (Tr. 250, 262), intelligence test results from the same month were in the average range (Tr. 250). Aside from a mild speech impairment, Claimant was deemed able to progress in the general curriculum (Tr. 251, 320, 323, 325).

### **B. Attending and Completing Tasks**

Plaintiff likewise disputes the ALJ’s finding that Claimant had less than marked limitation in attending and completing tasks. *Plaintiff’s Brief* at 6-7. She cites the October, 2008 observation that Claimant had frequent difficulty following a routine or staying on task. *Id.* at 7 (citing Tr. 211).

In regard to attending and completing tasks, § 416.926a(h)(2)(iii) states as follows:

As a preschooler, you should be able to pay attention when you are spoken to directly, sustain attention to your play and learning activities, and concentrate on activities like putting puzzles together or completing art projects. You should also be able to focus long enough to do many more things by yourself, such as getting your clothes together and dressing yourself, feeding yourself, or putting away your toys. You should usually be able to wait your turn and to change your activity when a caregiver or teacher says it is time to do something else.

The ALJ’s finding of less than marked limitations in this domain is admittedly a closer call. Academic records show that Claimant exhibited a number of signs of impairment in this domain, including (i) distraction, (iii) becoming side-tracked, (iv) abandoning tasks. Section 416.926a(h)(3). Nonetheless, substantial evidence supports the conclusion that the impairment was less than marked. The December, 2008 evaluation states that Claimant was

responsive to verbal praise, was able to engage in large motor activities, showed pride in his accomplishments, and was able to work up to 20 minutes without breaks (Tr. 242, 244, 248, 272). Notably, while evaluating staff recommend an intervention for speech therapy, Claimant did not receive a similar referral for ADHD (Tr. 259).

### **C. Interacting and Relating with Others**

The ALJ's finding that Claimant did not experience marked limitations in this domain is well supported (Tr. 18-19). Limitations in this domain may be shown by the following signs:

- (i) You do not reach out to be picked up and held by your caregiver. (ii) You have no close friends, or your friends are all older or younger than you. (iii) You avoid or withdraw from people you know, or you are overly anxious or fearful of meeting new people or trying new experiences. (iv) You have difficulty playing games or sports with rules. (v) You have difficulty communicating with others; e.g., in using verbal and nonverbal skills to express yourself, carrying on a conversation, or in asking others for assistance. (vi) You have difficulty speaking intelligibly or with adequate fluency.
- 20 CFR § 416.926a(i)(3).

However, the presence of such limitations does not imply the individual experiences marked limitations in this domain. *Id.*

Notwithstanding Claimant's mild speech impairment, the record supports a finding of less than marked limitations. While Plaintiff notes that the October, 2008 observations include "frequent temper tantrums" and emotional outbursts (Tr. 211), the December, 2008 evaluation states that Claimant was able to interact with other children and respond to correction (Tr. 248). In March, 2009, he was deemed impulsive but cooperative with no signs of aggression (Tr. 296). Claimant testified at the hearing that he played with a friend

at school (Tr. 45). He responded positively to adult attention and praise (Tr. 242, 244, 248).

#### **D. Ability to Care for Himself**

Plaintiff argues that substantial evidence does not support the finding that Claimant had no limitations in the ability to care for himself. *Plaintiff's Brief* at 10-11. She again cites the October, 2008 observation that Claimant had temper tantrums and was impatient (Tr. 211).

Section 416.926a (k)(2)(iii) lists a number of the expected capabilities of a preschooler in this domain:

You should want to take care of many of your physical needs by yourself (e.g., putting on your shoes, getting a snack), and also want to try doing some things that you cannot do fully (e.g., tying your shoes, climbing on a chair to reach something up high, taking a bath). Early in this age range, it may be easy for you to agree to do what your caregiver asks. Later, that may be difficult for you because you want to do things your way or not at all. These changes usually mean that you are more confident about your ideas and what you are able to do. You should also begin to understand how to control behaviors that are not good for you (e.g., crossing the street without an adult).

Examples of impairment in this domain include (i) “thumbsucking [or] re-chewing food, (ii) “rocking [or] headbanging,”(iii) the inability to dress oneself, or, (iv) ignoring safety rules. § 416.926a (k)(3). While Plaintiff testified that Claimant did not always respond to her warnings to avoid hazards (Tr. 48) and the December, 2008 evaluation states that Claimant engaged in impulsive behaviors, the transcript also supports the conclusion that he did not experience significant impairment in this domain. Claimant exhibited independence in self care activities, was age appropriate in grooming and was advanced for his age in

toileting and using utensils (Tr. 247). He testified that he was able to dress himself, ride a bike with training wheels, and wash his hands (Tr. 46-47). Even assuming that Claimant experienced some level of limitation in this domain, the evidence does not support the conclusion that he experienced marked difficulties.

### **E. Health and Physical Well-Being**

Plaintiff argues last that the ALJ erred by finding less than marked limitations in health and physical well-being. *Plaintiff's Brief* at 11-12. She notes that the ALJ failed to mention the condition of asthma in discussing this domain. *Id.* at 12.

Plaintiff's contention that asthma created a marked impairment does not provide grounds for remand. The criteria for a marked limitation in this domain is as follows:

[W]e may also consider you to have a marked limitation if you are frequently ill because of your impairment(s) or have frequent exacerbations of your impairment(s) that result in significant, documented symptoms or signs. For purposes of this domain, frequent means that you have episodes of illness or exacerbations that occur on an average of 3 times a year, or once every 4 months, each lasting 2 weeks or more. We may also find that you have a marked limitation if you have episodes that occur more often than 3 times in a year or once every 4 months but do not last for 2 weeks, or occur less often than an average of 3 times a year or once every 4 months but last longer than 2 weeks, if the overall effect (based on the length of the episode(s) or its frequency) is equivalent in severity. 20 C.F.R. § 416.926a(e)(2)(iv)(internal quotation marks omitted).

Claimant's asthma symptoms do not meet the above-stated criteria. To be sure, the record shows that he required medication for asthma and according to Plaintiff's testimony, received emergency treatment in the past (Tr. 49). However, neither the treating nor academic records suggest that the condition significantly impacted Claimant's functioning,

much less created a marked limitation. Plaintiff testified that Claimant had not had an asthma attack in the four months preceding the hearing (Tr. 49-50). Head Start records state that Claimant took asthma medicine “only as needed” (Tr. 284). Asthma symptoms did not prevent him from passing multiple physical exams required for participation in Head Start (Tr. 214, 280-281).

While Plaintiff also faults the ALJ for omitting mention of asthma in his analysis of this domain, he included accurate summation of the asthma treatment records earlier in the administrative opinion (Tr. 13). There is no basis to conclude that the ALJ did not consider asthma when determining the severity of Claimant’s physical problems.

In closing, I note that the record shows that Claimant experienced some family upheavals during his preschool years and my recommendation to uphold the Commission’s determination should not be read to trivialize these experiences. Nonetheless, because the determination that Claimant was not disabled is well within the “zone of choice” accorded to the fact-finder at the administrative hearing it should not be disturbed by this Court.

*Mullen v. Bowen, supra.*

## CONCLUSION

For the reasons stated above, I recommend that Defendant’s Motion for Summary Judgment [Doc. #19] be GRANTED, and that Plaintiff’s Motion for Summary Judgment [Doc. #14] be DENIED.

Any objections to this Report and Recommendation must be filed within 14 days of service of a copy hereof as provided for in 28 U.S.C. §636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505 (6<sup>th</sup> Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6<sup>th</sup> Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6<sup>th</sup> Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within 14 days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than 20 pages in length unless by motion and order such page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

**s/ R. Steven Whalen**

R. STEVEN WHALEN

UNITED STATES MAGISTRATE JUDGE

Dated: May 10, 2013

#### CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on May 10, 2013.

s/Johnetta M. Curry-Williams

Case Manager